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Honorable Vernon A. Williams, Secretary
Surface Transportation Board
1925 K Street, N.W.
Washington, DC 20423-0001

Re: STB Docket No. AB-290 (Sub-No. 262), Norfolk Southern Railway Company - Abandonment - In Beaufort County, North Carolina - Partial Norfolk Southern Railway Response to Motion to Dismiss or Reject

Dear Mr. Williams:

On November 22, 2005, PCS Phosphate Company, Inc. (PCS) filed a motion to dismiss or reject Norfolk Southern Railway Company's (NSR's) application for authority under 49 U.S.C. §10903 to abandon a line of railroad in Beaufort County, North Carolina, filed November 17, 2005. NSR also requested that the Board make certain findings related to the abandonment of the line. The subject line (the "Line") is located between approximately Milepost WL-26.7, near Aurora, NC, and the end of the line at approximately Milepost WL-31.3, near Lee Creek, NC, a distance of approximately 4.6 miles.

NSR intends to file a timely reply to the entire motion to dismiss or reject. NSR will show that PCS's motion presents no basis on which the Board can or should dismiss or reject NSR's application. Because the motion raises several issues, cites a number of cases, was filed immediately before the Thanksgiving holiday weekend and could not be considered by NSR counsel until Monday of this week, NSR likely will need most or all of the 20-day period to prepare a full reply to it.

The purpose of this letter is to provide the Board with NSR's preliminary response to Section V of PCS's motion. PCS argues in that section that the application

fails substantially to comply with the Board's rules, which it clearly does not. NSR does not waive or disclaim its right to reply to PCS's motion in its entirety, but files, and asks the Board to accept, this letter in partial response to a section of the motion because the date on which the Board will determine whether the application substantially conforms to the Board's regulations and provide for Federal Register publication of the filing will occur before the due date for NSR's reply to the motion. Section V of the motion deals with factors that the Board will, or might, consider in making this determination. NSR suspects that the Board may not take the motion into account, and in that event, the Board also would not need to take any NSR response into account, at least until the Board decided upon the disposition of the motion. However, NSR believes it prudent to provide a response that is available to the Board if the Board wishes to consider Section V of the motion and NSR's response to it in making its determination.

The Board evaluates applications soon after they are filed and rarely, if ever, would have motions requesting dismissal of the application because of its non-conformity with the Board's regulations for consideration in making the determination under 49 CFR 1152.24. The regulations do not require the Board to make, or even imply that the Board may make, such a determination based on a non-standard motion not shown in the abandonment regulations as part of the application process, especially under circumstances in which the applicant might not have time to reply to the motion. Assuming that the PCS motion was properly made despite the lack of provision for it in the abandonment regulations, the optional timing of such a motion could effectively preclude a response before the 20th day after the application was filed, much less a hurried or partial one.

Although we think it most likely the Board will not take Section V of PCS's motion into account in making the determination 49 CFR 1152.24, much less give it some presumptive validity if matters raised by the motion are unrebutted, yet are obviously immaterial, irrelevant or erroneous, NSR believes that its caution in placing this response on file will neither inconvenience the Board nor prejudice PCS. We see no reason for PCS to object to NSR having its response to certain matters raised in Section V of the PCS motion into the record at this time so that the Board can consider the arguments of both parties on these points if they wish to do so, while filing the remainder of its argument several days later, but still on time. PCS will not be prejudiced in any event, since it has no right to reply. Fundamental fairness not only requires that NSR be given a right to file a timely reply to the matters raised in Section V of the PCS motion if they are taken into account at this early time, but that NSR not be denied its right to reply to the entire motion. Since the PCS motion is not even provided for in the Board's regulations on abandonment procedures or the regulations,

NSR should not be required to file a premature and possibly incomplete reply to the entire motion, simply because of the timing of the motion in relation to another aspect of the proceeding requires the filing of a partial response to certain sections or on certain issues in order for NSR to timely reply with respect to the matter to be soon decided.

With that preface, NSR proceeds to respond to PCS's assertions. PCS has a weak position here based on strained interpretations of the regulations, errors in reviewing the application and unpersuasive arguments. Also, PCS attempts to use a variety of arguments on the merits to support its assertions with respect to the form and sufficiency of the application. Even if NSR were unable to refute these arguments, which we do below, they would present only issues on the merits, not a basis for the Board to reject the application.

PCS objects to the service of the Notice of Intent by Federal Express rather than certified mail as called for in the regulation. The chosen method of delivery was in substantial compliance with the regulation because it served the purpose of the regulation, delivery on a certain and timely date that could be verified by receipt or delivery record. PCS does not argue that the Notice of Intent was not timely received or that the receipt could not be verified, which it can. Most importantly, neither the Board nor any party could have been inconvenienced or prejudiced by the alternative delivery. This minor and insignificant flaw is the only one that PCS actually found in the process of filing the application or in the application itself and presents no basis for rejection of the application.

PCS quibbles that the service list for the Notice of Intent filed October 18, 2005 differs from the NOI service list in the application because the former service list did not show service on the Federal Railroad Administration and the Railroad Retirement Board while the latter did. PCS says it is unclear whether these agencies were served and whether the service was timely, although clearly, NSR certified in the application that the agencies were timely served.[1] NSR regrets any inconvenience that may have

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[1]The FRA, rarely, if ever, participates in an abandonment proceeding, and we believe it would have no reason to do so in this one. A search of Board decisions on the Board web site reveals no mention, much less any participation, of the Railroad Retirement Board in an abandonment proceeding over the past 9 years. While this does not mean service of the Notice of Intent on these agencies can be disregarded, it is difficult to see how PCS could be prejudiced even if service of the notice on these agencies was untimely, which it was not, much less by not learning about the service of the notice on these two agencies until the application was filed. The certification of

arisen from the fact that these agencies were not included on the original Notice of Intent service list, but this does not mean that they were not served or that NSR's application has not been filed in substantial compliance with the Board's regulations. These two agencies were served via first class mail, postage prepaid, under separate cover letters, with copies to the Board, on the following day, October 19, 2005. That still constituted timely service of the Notice of Intent on these agencies. Copies of the cover letters are attached. NSR saw no requirement in the regulations to serve other parties with notice that this supplementary mailing had been made to these two agencies, especially since an additional certification that the Notice of Intent requirements would be met would be in the application. No party could be prejudiced by not learning about the service of the Notice of Intent on these two agencies until they saw the certification in the filed application. Thus, NSR's certification in the application was correct. These agencies were served within the period between 15 and 30 days prior to the filing of the application. NSR's service of the Notice of Intent on these agencies complied with the Board's regulations.

PCS states that it could find no evidence in the application that NSR complied with the posting requirement for the Notice of Intent. We direct PCS's attention to pages 223-226 of volume 1 of the application which are certifications that the posting was made at four different stations or terminals, more than the regulations require.

PCS's argument that the filing of the application was untimely makes no sense and is clearly erroneous. PCS points out that 49 CFR 1152.20(b)(2) requires that newspaper publication of the Notice of Intent must be made "within" the 30-day period prior to filing the application but then bases its timeliness argument on the proposition that the filing can not be made until exactly 30 days after the first publication. This is not the regulation and it has never been interpreted that way. All three newspaper publications were "within" the 30-day period preceding the filing of the application. The Notice of Intent was served exactly 30 days prior to the filing of the application, which is timely. The regulation requires that it be served concurrently with either the first newspaper publication date or the service of the notice on the required parties, which it was since it was served on the earlier of those two dates.

PCS then attacks NSR's use of the 2003 URCS unit costs. NSR properly used the latest URCS unit costs available, the 2003 costs, and the latest Annual Report R-1. PCS's argument that the 2004 unit costs should have been available is beside the point since NSR used the URCS methodology and the latest Annual Report R-1 information,

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timely service in the application is correct and all that NSR is required to do.

and because the 2004 unit costs were not available. The costs were adjusted to the proper level.

PCS's argument that NSR can not include the cost of reconstructing the Line as a rehabilitation cost is an argument on the merits that NSR addressed at length in the application and will address to the extent it is otherwise raised in the motion to dismiss. This argument certainly can not support a finding that the application is deficient and should be rejected. PCS's further argument that so-called relocation expenses can not be treated as rehabilitation expenses and expensed entirely in the forecast year is another argument on the merits. Moreover, it is directly contrary to cases cited in the application and that can be cited in the full reply to the motion.

NSR has not double counted costs. In the Forecast Year, if NSR were to pay for the reconstruction of the Line, NSR would simultaneously experience the economic effects of constructing the new line and the effects of operating over the existing Line, including the attendant opportunity costs and holding gains which are based on the NLV calculation. In any event, if this argument were correct it would go to the weight and persuasiveness of NSR's evidence, not whether it is presented in compliance with the regulations.

While NSR's environmental report did conservatively assume the removal of the bridges on the line to show that the worst case salvage scenario would not result in an adverse environmental impact, and that the Board could apply such conditions as they though necessary, in fact NSR does not believe that any of these structures must be removed, as it also stated. Since 49 CFR 1152.34(c)(1)(iii)(A)(1) states that removal costs should not reduce the NLV of an asset below zero, we do not see how these costs could have the effect stated by PCS on either the sufficiency or the merits of the applications, even if they existed. Again, these are argument on the merits.

NSR records do not contain actual maintenance cost data in the USOA for the subject 4.6 miles of line. Normalized maintenance costs have been allowed in many cases by the Board as a permissible substitute for actual maintenance costs. The modest amounts used in the application as maintenance costs by NSR for this admittedly heavily used line fall well within the Board's guidelines as expressed in other cases. This PCS assertion too, if it had any validity, would not be an argument on the sufficiency of the application, but one on the merits.

NSR's calculations are based on PCS owning the land under both the current Line and any reconstructed line and on NSR owning the track and materials. This applies in both NSR's Base Year and Forecast Year calculations. PCS does not point

out more than an "appearance" of inconsistency in the application with respect to land ownership. PCS does not identify how that supposed inconsistency arises and what effect it believes it has on the sufficiency or the merits of NSR's application. Thus, NSR can not address whether a mistake, which would be non-substantive, was made in some description somewhere in the application. Nonetheless, NSR is confident that the calculations in the application treat ownership of the land and ownership of the track and materials consistently. This vague PCS assertion merits no further consideration.

There are three "bridges" on the line although two of them are rather small and might be considered trestles. The three structures are at Milepost WL 26.7 (on the border of the subject Line), Milepost WL 27.6 and Milepost WL 28.5. We do not believe there is any substantive or material inconsistency between the environmental report and the application and without reference to the supposed error, we cannot comment further. The assertion concerning the inconsistent description of the number of bridges would not, without more, even be considered a material error, much less support PCS's request to reject the application.

NSR's substantive and economic case is by no means theoretical, as alleged by PCS, even though the conservative, worst case environmental report scenario is theoretical and is not expected to occur. No diversion of traffic is actually expected. PCS cites a decision later in its argument for the proposition, and bases much of its argument on, the supposed need to submit detailed information in an environmental report. Yet PCS chides NSR for submitting additional information for consideration before it turns in the direction of arguing that NSR should actually submit even more unnecessary and even more theoretical information. NSR has no reason to doubt PCS's assertions that it will build a lead track to the railroad line at Aurora no matter which party ultimately must pay for it. Thus, the real bottom line is that no diversion of traffic will occur as a result of the abandonment of the subject Line. Any further consideration of traffic diversion is an exercise, even if it may be considered a necessary one.

The presentations in the environmental report and the application are made for two different purposes. PCS is not prejudiced by NSR's presentations because each approach, a worst case environmental approach, and a best case approach on future traffic and, thus, revenue to NSR for the maintenance and operation of the Line, is the more conservative. Each approach is the more favorable to PCS's arguments in the area in which it is presented. Retention of the traffic in the calculations and assumptions in the application produces more revenue for NSR and brings its operation and maintenance of the line closer to profitability. The facts and economic projections will form the principal basis for the decision and those are stated as favorably to PCS

as are realistically possible. Surely, PCS can not argue that it will divert all of the rail traffic to the highway if it must reach the railroad over a lead track, which it contends it will build, rather than a main line. The Environmental Report does not undermine NSR's case. PCS's argument concerning these supposed inconsistencies also would be on the merits, at least if PCS could figure out a way in which the two conservative presentations for different purposes, both in its favor, prejudiced its position.

NSR's traffic diversion numbers are based on the conservative assumption that perhaps PCS would divert some traffic to truck if it had to rely on service over its own track to reach the main-line railroad (which it could contract with the railroad to perform in any event) even if PCS's rail shipping option were retained through the construction of the track that it asserts it will build. There is no reason to believe that at the end of the proceeding, any traffic will be diverted to truck. It is also based on a more general assumption concerning the likelihood of rail-truck transload transportation service in the event PCS does not build the lead track it says it is building or about to build.

Those assumptions are also based on the likelihood that since all commodities shipped or received by PCS are capable of barge transportation, PCS would choose the lowest cost transportation alternative if all of its rail traffic had to be diverted to other modes. In most cases that diverted traffic would most logically go to barge or perhaps rail-truck transload movements. Some traffic might need to be transloaded to or from barges closer to its origin or destination for ultimate receipt or delivery but that does not mean the barge alternative does not exist. Nor does it mean that there would be a further environmental impact in the area of the Line. PCS argues that if barge movement were a lower cost alternative to rail traffic, the traffic would have already been diverted to barge transportation. We do not understand that a lower cost alternative to be a requirement for whether alternate transportation is available, or makes the most sense, in a diversion scenario. It would certainly be assumed that in most cases the truck alternative also would be higher cost. The barge alternative is available, as PCS has publicly stated on its web site, and there is little reason to assume that PCS would not use it if it had to, which, of course, it will not.

NSR's possible diversion scenario includes diversion of stoker coal and low volume commodities to truck. Since most of these commodities are capable of transloading, we assume that they would be shipped by rail to Aurora and transloaded in the case of full abandonment of the Line. We do not know why PCS would pursue the higher cost and presumably inconvenient all-truck movements that it postulates in its motion in its effort to show that NSR should consider these irrational and unlikely alternatives that are even more theoretical than the alternative NSR showed. Their presentation would not be required, even if PCS's access to rail service were cut off,

and they appear, being without support other than mere assertions, to make little sense. NSR is not required to go through a variety of increasingly less likely possibilities in its environmental report, only those that will occur or are most likely to occur. PCS's lack of explanation is fatal to this argument, which again, is an argument on the merits.

The small diversion of the small annual volume of stoker coal shipped to PCS to a rail-truck, or even to an all-truck, movement would have no significant impact on transportation of energy resources. PCS has no foundation for the assertion that some additional study of energy impacts is required. Certainly PCS would still receive the coal, which is the main point of the environmental report item in any event.

PCS makes the curious argument that NSR has "all but" ignored the requirements of the Coastal Zone Management Act and the effect of the abandonment on the wetlands or flood plains, recognizing begrudgingly that in fact NSR has not ignored these requirements and effects. NSR did address these impacts, which would be very slight and transient since all NSR would do would be to pick up tracks and material from a graded right-of-way that is well drained and apart from the wetlands or flood plains. NSR has contacted all of the required agencies. PCS also conveniently forgets all of the environmental processing and permits it has already performed or acquired for its projected use of the property for mining after abandonment of the Line. NSR would not be required to address this post-abandonment use of the property even if PCS had not already engaged in far more environmental review and permitting than a railroad ever would do as a result of an abandonment.

None of PCS's arguments with respect to the environmental report show that the report, much less the application of which it is a part, should be rejected or needs to be modified or supplemented. PCS's arguments are almost all on the merits of the presentation, but they fail as arguments on the merits as well as arguments in support of rejection of the application.

In examining NSR's lengthy and carefully prepared application in compliance with the Board's extensive regulations, PCS has found one minor and non-prejudicial flaw (service of the Notice of Intent by Federal Express rather than certified mail) and has mistakenly thought it had found a few other minor defects in NSR's presentation, which NSR refutes in this letter. PCS has further argued several points on the merits, not the sufficiency, of parts of NSR's presentation, mostly with respect to the environmental report, as a basis for rejecting the application. Not only do these latter arguments provide no basis for the Board to reject the application, they are clearly without substantive merit.

Therefore, NSR requests that if the Board considers Section V of PCS's motion to dismiss or reject NSR's application in the subject proceeding in the Board's forthcoming, imminent determination with respect to the sufficiency of NSR's application and its publication of notice in the Federal Register, that the Board also consider NSR's response to that section of the reply provided in this letter. NSR requests that the Board accept this letter in partial response only to Section V of the PCS motion to dismiss and without prejudice to NSR's filing of its complete reply to all parts of the PCS motion.

Yours very truly,

James R. Paschall

Enclosures

cc w/ encl. via Federal Express
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October 19, 2005

U. S. Railroad Retirement Board
844 North Rush Street
Chicago, IL 60611-2092

Re: STB Docket No. AB-290 (Sub. No. 262), Norfolk Southern Railway Company – Abandonment – in Beaufort County, North Carolina – Notice of Intent to Abandon Rail Service

Dear Sir/Madam:

Enclosed please find Norfolk Southern Railway Company's Notice of Intent to Abandon Rail Service, with regard to a 4.6-mile line of railroad from milepost WL-26.7 near Aurora, North Carolina, to milepost WL-31.3 near Lee Creek, North Carolina.

Yours very truly,

James R. Paschall

JRP/kch
Enclosure

cc: Vernon A. Williams, Secretary
Surface Transportation Board

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October 19, 2005

Mr. Joseph H. Boardman, Administrator
United States Department of Transportation
Federal Railroad Administration
1120 Vermont Avenue, NW
Washington, DC 20590

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